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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ACCURATE ABSTRACTS, LLC, Plaintiff, -against- HAVAS EDGE, LLC, Defendant.	Civil Action No. 2:14-cv-01994-KM-MAH Motion Day: April 17, 2017

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT'S
MOTION TO STRIKE THE AMENDED EXPERT REPORT OF RICK DOVE

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Defendant/Counterclaim Plaintiff Havas Edge, LLC ("Havas" or "Defendant") respectfully submits this reply memorandum of law in further support of its Motion, pursuant to Fed. R. Civ. P. 16, 26, and/or 37, to Strike the Amended Expert Report of Rick Dove served upon Defendant by Plaintiff/Counterclaim Defendant Accurate Abstracts, LLC ("Accurate Abstracts" or "Plaintiff") on March 6, 2017.

PRELIMINARY STATEMENT

On March 6, 2017, Plaintiff served upon Defendant an "amended" report from its retained expert, Rick Dove, containing four new opinions, nearly five pages of new data in support of those opinions, and more than a page of new witness qualifications ("Amended Report"). Plaintiff now seeks to use the Amended Report in this action even though it (a) comes months after expiration of all relevant Court-imposed deadlines for expert discovery; (b) contains no information that was previously unavailable to Plaintiff or Mr. Dove; (c) was not disclosed to Defendant at the parties' March 1, 2017 settlement conference at which Plaintiff agreed to a summary judgment briefing schedule; and (d) is clearly designed only to bolster and improve upon Mr. Dove's initial report of September 7, 2016 ("Original Report"). It warrants an appropriate sanction of exclusion as in violation of Rules 16, 26, and 37 of the Federal Rules of Civil Procedure and the Court's Pretrial Scheduling Order of January 21, 2016. (See Turinsky Decl., Ex. A [ECF No. 59-3].)[1]

Nothing in Plaintiff's April 7, 2017 memorandum of law in opposition (ECF No. 63) ("Opposition Brief") warrants a contrary conclusion. Plaintiff offers no excuse (valid or otherwise) for its flagrant violation of the Pretrial Scheduling Order or its outright failure to

[1] All references to "Turinsky Decl." and accompanying exhibits are to the Declaration of Daniel Turinsky in Support of Defendant's Motion to Strike the Amended Expert Report of Rick Dove, dated and filed March 24, 2017 (ECF No. 59-2).

request a modification. Plaintiff also fails to address virtually ***any*** of the overwhelming bases supporting exclusion as a proper sanction under Rules 16 and 37. Indeed, Plaintiff offers no argument that it had "good cause" for serving its months-late Amended Report under Rule 16, and no rebuttal to undisputed facts clearly evincing Plaintiff's bad faith and willfulness in doing so. Instead, Plaintiff repeatedly (and confusingly) claims that the Amended Report merely "memorializes" Mr. Dove's deposition testimony but ***also*** contains "new" and "further" opinions wholly foreign to the Original Report. Either way and as fully explained below, the Amended Report falls well beyond any proper supplementation or correction required by Rule 26(e).

Accordingly, the Court should issue an appropriate order striking the Amended Report and precluding Plaintiff from using or relying upon it in this action.

ARGUMENT

I. The Court Should Exclude the Amended Report as in Violation of Both Federal and Court Rules

A. The Amended Report Violates the Pretrial Scheduling Order

First, the Amended Report violates the Pretrial Scheduling Order and thus Rule 16(b)(4), under which a court's scheduling order "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). While Plaintiff claims it "fully complied with every aspect of the Scheduling Order," (Pl.'s Opp. Br. at 4), it fails to mention its unambiguous requirements:

- "All affirmative expert reports shall be delivered by **September 9, 2016**";
- "Expert discovery, including the depositions of any expert witnesses, shall be completed on or before **December 21, 2016**"; and
- "**FAILURE TO FOLLOW THIS ORDER WILL RESULT IN SANCTIONS PURSUANT TO Fed. R. Civ. P. 16(f) and 37.**"

(Turinsky Decl., Ex. A [ECF No. 59-3], ¶¶ 15, 18, 22 (all emphases in original).)

Here, Plaintiff submitted the Amended Report on March 6, 2017, nearly six months after its deadline to serve affirmative expert reports and more than three months after the close of expert discovery. (Compare Turinsky Decl., Ex. A [ECF No. 59-3], with id., Ex. F [ECF No. 59-8].) Plaintiff offers no argument: why it should be excused from never having sought to modify the Pretrial Scheduling Order; or that it possesses the requisite "good cause" under Rule 16(b)(4) had it done so. The Court should exercise its discretion to exclude the Amended Report on this ground alone. See, e.g., Hioutakos v. SimplexGrinnell LP, 2014 WL 1255197, at *1–2 (D.N.J. Mar. 26, 2014) (affirming sanctions for "post-deposition revision" of expert report submitted "without leave of the Court" and in violation of "Judge Arleo's Scheduling Order"); McDaniel v. Kidde Residential & Commercial, 2015 WL 6736811, at *2 (W.D. Pa. Nov. 3, 2015) (striking "supplemental report" containing "additional expert opinion" where report was served "well after the final deadline" for expert reports and for completion of expert discovery); McDonough v. Horizon Blue Cross Blue Shield of New Jersey, Inc., 2013 WL 322595, at *1 (D.N.J. Jan. 22, 2013) (affirming denial of plaintiff's application to "extend the expert discovery deadline" to serve "previously unproduced" expert report where plaintiff showed no "good cause for the timing of this disclosure" and where data in new report was "all available to the plaintiff" previously).

B. The Amended Report Violates Federal Rule 26(a) and Is Not a Permissible Supplement or Correction Under Federal Rule 26(e)

Second, the Amended Report violates Rule 26, which in pertinent part requires an expert report to contain "a complete statement of all opinions the witness will express and the basis and reasons for them," "the facts or data considered by the witness in forming them," and "the witness's qualifications." Fed. R. Civ. P. 26(a)(2)(B)(i)–(vi). It also requires that a party "make these disclosures at the times and in the sequence that the court orders." Id. (a)(2)(D).

Plaintiff has failed to comply with these requirements. As discussed above and in Defendant's Opening Brief (ECF No. 59-1), Plaintiff submitted the Amended Report well after all applicable court-ordered deadlines expired in violation of Rule 26(a)(2)(D). (Turinsky Decl., Ex. A [ECF No. 59-3].) The Amended Report also does not qualify as a proper supplement to, or correction of, an expert disclosure under Rule 26(e). It contains not one but four new opinions, more than five additional pages of new supporting data, and more than a page of new witness qualifications. (Turinsky Decl., Ex. E [ECF No. 59-7] at 4–5, 16–21, 23–24.) There is no indication in the Amended Report, or argument from Plaintiff, that any of this information was previously unavailable to Plaintiff or Mr. Dove. "The word 'incomplete' in Rule 26(e) cannot be expanded to permit a constant stream of 'new' information that was available at the time of the initial report, but was not included because of a lack of due diligence." Sandata Techs., Inc. v. Infocrossing, Inc., 2007 WL 4157163, at *5 n.5 (S.D.N.Y. Nov. 16, 2007) (precluding party from relying on "Supplementary Report" whose "so-called 'new information'" included "the deposition testimony" of the movant's experts); Hioutakos, 2014 WL 1255197, at *3 ("[C]ounsel's duty under Fed. R. Civ. P. 26(e)(2) to correct materially incomplete or erroneous information should not be misused to circumvent deadlines or turn an expert report into a moving target.").

In its Opposition Brief, Plaintiff offers a number of arguments why the Court should ignore its wholesale distortion of Rule 26. None have merit.

Plaintiff first argues that the Amended Report is "required by" Rule 26(e). (Pl.'s Opp. Br. at 8.) Plaintiff repeatedly claims it "only memorializes" Mr. Dove's deposition testimony, (Pl.'s Opp. Br. at 1, 2, 3, 7), and "adds the information he provided in [his deposition] testimony and nothing more." (Id. at 8, 11.) Even assuming Plaintiff's assertions are true (which they are not), they fall well outside the bounds of proper supplementation under Rule 26(e). As Magistrate Judge Katz explained in a highly similar case, "[i]t is ***only if*** the expert ***subsequently learns*** of information that was ***previously unknown or unavailable***, that renders information previously provided in an initial report inaccurate or misleading because it was incomplete, that the duty to supplement arises" under Rule 26(e). Sandata, 2007 WL 4157163, at *4 (emphasis added). In Sandata, Infocrossing argued a "Supplementary Report" it unveiled during its expert's deposition was a proper supplement required by Rule 26(e)(1) because its "so-called 'new information'" included "deposition testimony of Sandata's experts." Id. at *3–4. Magistrate Judge Katz "could not disagree more vigorously" with Infocrossing's argument, which he described as "wholly disingenuous" and "sanctionable" given the clear purpose of Rule 26(e). Id. at *3–5. Rule 26(e) "does not grant a license to supplement a previously filed expert report because a party wants to, but instead imposes an obligation to supplement the report when a party discovers the information it has disclosed is incomplete or incorrect." Id. at *5 (internal quotation marks omitted).

Plaintiff then devotes substantial discussion to then-Magistrate Judge Wolfson's 1996 decision in ABB Preheater, Inc. v. Regenerative Environmental Equipment Co., Inc., 167 F.R.D. 668 (D.N.J. 1996). (Pl.'s Opp. Br. at 9–11.) Plaintiff's reliance on ABB Preheater is misplaced. ABB Preheater was a patent infringement case where the plaintiff moved to exclude an expert rebuttal report submitted ***before*** the court-ordered discovery deadline. 167 F.R.D. at 672. Indeed, the magistrate judge's ruling in ABB Preheater had nothing to do with court-imposed or FRCP deadlines at all; the plaintiff claimed only that the defendant "failed to follow an established order of proof" given the substance of the rebuttal report, which the plaintiff argued more properly "belonged" in the "direct" report in light of the burden-shifting framework specifically applicable to patent challenges based on claims of obviousness. Id. (discussing how "secondary considerations" of non-obviousness under "the Graham factors" are appropriate for rebuttal under the final step). Nor is there any indication the defendant–non-movant in ABB Preheater tried to do what Plaintiff seeks to here: correct a timely expert report submitted ***before*** the expert's deposition, with new opinions, data, and qualifications ***after*** the expert's deposition and all applicable deadlines. Finally, that Plaintiff submitted the Amended Report immediately after agreeing to a briefing schedule for dispositive motion practice further punctuates the contrast with the magistrate judge's ruling in ABB Preheater.

Plaintiff also repeatedly invokes its ***own*** opinion as to the purported merit of Mr. Dove's first report. For instance, Plaintiff claims the Amended Report cannot have been submitted to "bolster" the Original Report since, in its opinion, the Original Report "was not weak in any way." (Pl.'s Opp. Br. at 3; see also id. at 11 (characterizing the Original Report as "more than fine").) Indeed, Plaintiff's sole basis for distinguishing Judge McNulty's decision in Hioutakos, 2014 WL 1255197, is its apparent belief that "[t]here are no flaws in Mr. Dove's initial report." (Pl.'s Opp. Br. at 13.) Aside from raising the question why a supposedly flawless report would require supplementation in the first place, Plaintiff offers no authority for the proposition that a party can continue to add whatever it wants, whenever it wants, to its expert disclosures as long as it believes its prior submissions were of acceptable quality. Indeed, Rule 26(e) imposes a ***duty*** that ***requires*** supplementation or correction for the benefit of the ***opposing*** party. As Magistrate Judge Katz recognized, "[d]uties are usually owed to other people, and are not for the benefit of the party who has the duty." See Sendata, 2007 WL 4157163, at *7 (precluding use of opinions contained in Supplemental Report where "it is only Infocrossing that benefits from its expert's repeated revisions of his report, at the expense of Sandata"); see also Robocast, Inc. v. Apple

Inc., 2014 WL 334199, at *1 (D. Del. Jan. 28, 2014) ("Rule 26 imposes a *duty* on Plaintiffs; it grants them no *right* to produce information in a belated fashion") (emphasis in original).

Finally, Plaintiff ***concedes*** that the Amended Report contains "new" and/or "further" opinions. (Pl.'s Opp. Br. at 12, 13). That is exactly what is forbidden. "Rule 26(e) is not an avenue to correct failures of omission because the expert did an inadequate or incomplete preparation, add new opinions, or deepen or strengthen existing opinions." In re Asbestos Prod. Liab. Litig. (No. VI), 289 F.R.D. 424, 425 (E.D. Pa. 2013) (citations and internal quotation marks omitted); see, e.g., Robocast, 2014 WL 334199, at *1 (affirming special master's order striking supplemental expert report which "added new theories that could have been contained in the original report," noting that Rule 26 "does not give license to sandbag one's opponent with claims and issues which should have been included in the expert witness' report"). Nor are experts "free to continually bolster, strengthen, or improve their reports" or "to continually supplement their opinions. If that were the case, there would never be any closure to expert discovery, and parties would need to depose the same expert multiple times." Sandata, 2007 WL 4157163, at *6. That is the exact scenario Plaintiff stands poised to create.

C. Exclusion of the Amended Report Represents an Appropriate Sanction Under Federal Rules 16(f) and 37(c)

Thirdly, as contemplated by the Court's Pretrial Scheduling Order, exclusion of the Amended Report is an appropriate sanction under Rules 16(f) and 37(c), Fed. R. Civ. P.; (see Turinsky Decl., Ex. A [ECF No. 59-3] (warning that "failure to follow" Pretrial Scheduling Order "will result in sanctions pursuant to Fed. R. Civ. P. 16(f) and 37" (emphasis omitted)). As discussed above and in Defendant's Opening Brief, Rule 16(f) permits a court to "issue any just orders," including for sanctions, if a party "fails to obey a scheduling or other pretrial order." Rule 37(c) permits sanctions if a party "fails to provide information or identify a witness as required by Rule 26(a) or (e)." Fed. R. Civ. P. 37(c). Courts routinely exclude expert disclosures and/or sanction offending parties for similar violations. See, e.g., Hioutakos, 2014 WL at 1255197, at *2–3; Reckitt Benckiser Inc. v. Tris Pharma, Inc., 2011 WL 6722707, at *6–9 (D.N.J. Dec. 21, 2011) (affirming order striking "Supplemental Report" under Rule 37(c) where served "after agreed upon expert dates had passed"); Opengate Capital Grp. LLC v. Thermo Fischer Sci. Inc., 2016 WL 8488409, at *2 (D. Del. Feb. 1, 2016) (denying motion to serve supplemental expert report because "parties may not use their obligation to supplement as an excuse to violate the clear terms of a Scheduling Order, unilaterally buying themselves additional time to make disclosures, thereby unduly prejudicing other parties and potentially delaying the progress of a case") (citations omitted).

Plaintiff offers scant argument with respect to Rule 37(c) or the factors first articulated in Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 904–05 (3d Cir. 1977)). For example, it apparently argues that because "[t]here was no bad faith" found in ABB Preheater, (Pl.'s Opp. Br. at 11), the same must be true here. Not only does it offer no evidence whatsoever of any supposed ***good*** faith, it wholly ignores that: (1) the Amended Report is actually dated February 11, 2017—nearly three weeks before Plaintiff finally disclosed it to Defendant, (Turinsky Decl., Ex. E [ECF No. 59-7]); (2) Plaintiff ***still*** has not sought leave from the Court to re-open discovery or modify the Pretrial Scheduling Order; and (3) Plaintiff never revealed its intent to serve additional expert discovery during the parties' March 1, 2017 settlement conference at which it ***agreed*** to a summary judgment schedule ***while knowing*** it had the Amended Report in its back pocket. These facts well exceed those on which other courts have found bad faith or willfulness under Rule 37(c). See, e.g., Reckitt, 2011 WL 6722707, at *8 (finding bad faith under Pennypack factors where plaintiffs had "'gotcha' mentality," serving their "Supplemental Report only after agreed upon expert dates had passed and in reliance thereon, Defendants filed their motion for summary judgment"); Astrazeneca LP v. Breath Ltd., 2014 WL 4798477, at *4–5 (D.N.J. Sept. 26, 2014) (striking expert report in part because offering party "[a]t the very least" "should have disclosed its intention to rely upon [new expert], as well as the scope of his experiments, in response" to movant's expert report); McDaniel, 2015 WL 6736811, at *4 (finding "late disclosure of Dr. Cagan's supplemental opinions . . . 'willful' for a number of reasons," namely that "disclosure was served in clear violation of this Court's numerous scheduling Orders and Rule 26, without leave of Court").

Plaintiff also claims the Amended Report is "harmless," in part because the parties could simply adjourn their summary judgment briefing schedule and, "if necessary," agree to allow Defendant to submit a supplemental report of its own. (Pl.'s Opp. Br. at 13–14.) This misses the point of its Rule 26 obligations. "Prejudice is inherent when deadlines are disregarded in complex cases with extensive discovery, particularly when supplemental expert reports are submitted following that expert's deposition." Apotex v. Cephalon, Inc., 2015 WL 12645745, at *2 (E.D. Pa. May 26, 2015) (affirming order granting motion to strike untimely expert report); see also Ciomber v. Coop. Plus, Inc., 527 F.3d 635, 642 (7th Cir. 2008) ("The purpose of Rule 26(a) is to provide notice to opposing counsel—***before the deposition***—as to what the expert witness will testify, and this purpose would be completely undermined if parties were allowed to cure deficient reports with later deposition testimony.") (emphasis added) (citations omitted).

Plaintiff also argues the Amended Report is "harmless" because it does not actually include four new opinions, but "just one" which "is not really 'new.'" (Pl.'s Opp. Br. at 13.) The Amended Report speaks for itself. It ***labels*** its four new opinions H, I, J, and K, each of which offers an entirely new opinion distinct from one another other as well as the seven existing opinions. (Amended Report [ECF No. 59-7] at 4–5, ¶¶ H–K.) At least three of the new opinions appear to relate to varying extents to Defendant's project management responsibilities and performance thereof—topics Mr. Dove testified under oath he was ***not*** opining on in this case. (Turinsky Decl., Ex. C [ECF No. 59-5] at 36:18–20.) Mr. Dove also devotes roughly the same amount of space to these four new opinions as to his previous seven (nearly two full pages), and unveils more than five pages of new supporting data and qualifications—all of which evaded scrutiny during Mr. Dove's December 12, 2016 deposition and which reflect information already known to Mr. Dove. See, e.g., Astrazeneca LP, 2014 WL 4798477, at *4 (finding that expert report would "inure to the prejudice of Defendants" in part where it "attempt[ed] to rebut" information and "corresponding expert opinions" that "were known" to it months before via prior fact and expert discovery).

In sum, the Amended Report should be stricken pursuant to applicable Federal Rules and controlling Third Circuit precedent.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court issue an order striking the Amended Report, precluding Plaintiff from using and/or relying on the Amended Report in any further proceeding in this action, and awarding Defendant its attorneys' fees and costs in connection with this Motion.

Dated: April 13, 2017

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